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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1328

WOODROW WILSON LASHLEY, SR. AND
CLAIRE ANITA RYZA,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from an order of the Court of Appeals of Maryland entered on November 10, 1970 (App. B., p. 9a) denying Appellants' Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland. The Court of Special Appeals of Maryland affirmed a judgment of conviction of the Circuit Court for Wicomico County under Article 27, Section 3 of the Annotated Code of Maryland (1957 ed.), now repealed.

OPINIONS BELOW

The Court of Appeals of Maryland denied appellants' petition for writ of certiorari without opinion. The Court of Special Appeals of Maryland filed in the court below an opinion which is reported at 10 Md. App. 136 (1970). This opinion is reprinted in App. A. p. 1a.

JURISDICTION

The jurisdiction of this court rests upon 28 U.S.C. Section 1257(2). See: *Griswold v. Connecticut,* 381 U.S. 479 (1965); *United States v. Vuitch,* 90 S. Ct. 1497 (1970); *Hodgson v. Randall,* 91 S. Ct. 104 (1970).

STATUTE INVOLVED

ANNOTATED CODE OF MARYLAND (1957 ed.)

Article 27, Section 3

§ 3. *Causing miscarriage or abortion, encouraging by advertisement, etc.; drugs, instruments, etc.; exceptions.*

Any person who shall knowingly advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop, or office, where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, for the purpose of producing abortion, can be procured, or who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or from whom any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred dollars nor more than

one thousand dollars, or by both, in the discretion of the court; and in case of fine being imposed, one half thereof shall be paid to the State of Maryland, and one half to the school fund of the city or county where the offense was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother.[1]

QUESTIONS PRESENTED

1. Was Article 27, Section 3 prior to its repeal unconstitutional under the 1st, 4th, 9th and 14th Amendments.

2. Do the plaintiffs have standing to assert the unconstitutionality of Article 27, Section 3 prior to its repeal.

STATEMENT

This is an appeal from a denial by the Court of Appeals of Maryland of Appellants' Petition for a Writ of Certiorari from a final decision of the Court of Special Appeals affirming the verdict and judgment of the Circuit Court for Wicomico County (William W. Travers, Judge, sitting without a jury) finding the Appellants, Woodrow Wilson Lashley, Sr., and Claire Anita Ryza, guilty on two counts of amended informations charging the commission of two abortions, three counts of conspiracy to commit abortion and

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[1] This statute was repealed by Chapter 470, Section 1 of the Laws of Maryland, 1968. It was replaced by what is known as the Therapeutic Abortion Law, Article 43, Sections 149 E, 149 F, and 149 G.

practicing medicine without a license. The Appellants were sentenced to concurrent terms of two years on each of the abortion and conspiracy to commit abortion counts, and a small fine was imposed for practicing medicine without a license. The thrust of the Appellants' position below was that the provisions of Article 27, Section 3 of the Annotated Code of Maryland (1967 Repl. Vol) (now repealed) are unconstitutional on their face and unconstitutional, as applied to the within case. This case involves the issue of uniform application of the doctrine of standing to challenge the infringement of constitutionally protected rights as enunciated by the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557 (1968).

Chief Judge Murpny writing for the Court of Special Appeals held that "the appellants lack standing to attack as unconstitutional on due process grounds, the proviso in Section 3 governing abortions by licensed physicians," and therefore the court below did not reach the constitutional issues.

THE QUESTIONS ARE SUBSTANTIAL

1. *The conflict of decisions.* The decision of the Court of Special Appeals below as affirmed by the Court of Appeals in denying Appellants' standing to challenge the constitutionality of Article 27, Section 3, prior to its repeal, is in direct conflict with a decision of the United States Court of Appeals for the 1st Circuit in *Baird v. Eisenstadt*, 429 F. 2d 1398 (1970). In that case, not dissimilar from this, the defendant was charged with violating the Massachusetts statute which prohibits a person other than a registered physician or pharmacist from prescribing or furnishing any drug, medicine, instrument or article for the prevention of conception. In discussing the defendants' standing to challenge the constitutionality of the statute, the Court held

"Petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else." In the within case the Appellants too are facing severe sentences and they too, to paraphrase the First Circuit, must have as much standing as anyone else.

The Court of Special Appeals in its opinion held that "the petitioners lack standing to attack as unconstitutional on due process grounds", the constitutionality of Article 27, Section 3, the statute under which they were convicted. Therefore, the Court held, that there was no need to reach the issue of constitutionality. It is the Appellants' contentions that they do possess the requisite standing to attack the statute's constitutionality.

The incongruity of the position of the Maryland Courts is pointed up by a recent Pennsylvania decision which declared its abortion law unconstitutional on due process grounds at the behest of a motorcycle mechanic, who gained his experience in the merchant marine, after the had entered a guilty plea to abortion charges. (*Comm. v. Page*, Centre County, Pa. Common Pleas Court, Nov. 27, 1970, 8 Cr. L. 2222).

If it is assumed, for argument's sake, that women have at least some rights concerning when they may have abortions performed and that the statute is unconstitutionally vague and/or restrictive as to when medical practitioners may perform such abortions, then it follows that the Appellants, although not medical practitioners, were the only avenue which some pregnant women could turn to in order to vindicate their constitutionally protected rights.

The recent case of *Roe v. Wade*, 314 F. Supp. 1217 (D.C. W.D., Texas 1970), *People v. Belous*, 458 P. 2d 194 (Cal. 1969), cert. den. 397 U.S. 915 (1970), *Babbitz v. McCann*, 310 F. Supp. 293 (D.C.E.D. 1969), *United States v. Vuitch*,

305 F. Supp. 1032 (D.C.D.C. 1969), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), indicate that women have certain rights to abortions and that many statutes, including the one under which Appellants were convicted, are unconstitutionally vague and or restrictive since they are unclear as to when a physician may properly perform a statutorily permissible abortion.*

In the case of *People vs. Belous*, *supra*, at page 357, the California Court stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Courts and this Court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters relating to marriage, family, and sex. [citing cases elaborating on the extent of this right and its origin] That such a right is not enumerated in either the United States or the California Constitutions is no impediment to the existence of the right. [citing cases] It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right."

Further, in *United States v. Vuitch*, *supra*, the United States District Court for the District of Columbia in finding that the District's statute, similar to that in this case, was unconstitutional held that the statute as applied resulted in the Government establishing that a physician committed an abortion, thereby shifting the burden to the physician to justify his acts.

> "In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary*, 395 U.S. 6 (1969),

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* Compare, *Rosen v. Louisiana*, 318 F. Supp. 1217 (1970), a 2-1 decision upholding Louisiana's abortion laws.

and *Gainey*, 380 U.S. 63 (1965), also emphasize the lack of necessary precision in this criminal statute."

In *Timanus vs. State*, 200 Md. 133, an abortion prosecution against a doctor, the Court of Appeals ruled:

> "The defense was that they were legal under the proviso. It would seem that the burden of providing justification as an affirmative defense was upon the defendants."

Thus, the identical constitutional defects are present in both the Maryland and District of Columbia statutes, as construed and applied. Both statutes overlook entirely the existence of the woman's right to terminate a pregnancy at some point as well as providing a reasonable and legitimate standard by which therapeutic abortions may be allowed. The conclusion to be drawn is that in many cases physicians are hesitant to perform abortions because of the criminal penalties attached if their interpretation of the statute is incorrect. It seems somewhat meaningless to recognize that a woman has a right to an abortion and then to so restrict and vaguely qualify the right by standards which if misapplied result in a criminal prosecution.

A three judge federal panel in *Karalexis v. Byrne*, 306 F. Supp. 1364 (D.C. Mass. 1969) considering a challenge of the Massachusetts obscenity statute by a movie exhibitor of an alleged obscene movie on the grounds that the viewers' (patrons) First Amendment right to view and possess obscene matters, gave the exhibitor standing to challenge the statute as well, held:

> "A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. Cf. Griswold v. Connecticut, 1965, 381 U.S. 479 . . ."

In fact, the Court in *Karalexis*, applying the mandate of *Stanley v. Georgia*, 394 U.S. 564, 89 S. Ct. 1243 (1969) which establishes the right of an individual to possess and view obscene matter, extended the individual's right to the purveyor or merchant. The Court in *Karalexis*, recognizing the State's right and interest to regulate distribution of obscenity made an independent evaluation of the State's existing statute to determine whether it unconstitutionally restricted the individual's protected right. If it did, notwithstanding the fact that State could have legitimately policed distribution of obscenity, it failed to do so and the prosecutions must cease.

The Court in *Karalexis* addressed itself to standing and adopted what it believed to be the Supreme Court's view, namely that the standing requirements are relaxed in "cases dealing with free expression". See *United States v. Raines*, 362 U.S. 17, 20 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940); Sedler, *Standing to Assert Constitutional Jus Tertu in Supreme Court*, 71 Yale L. J. 599 (1962).

In *Griswold v. Connecticut, supra*, among the defendants convicted of violating the Connecticut birth control law was a non-physician director of the Planned Parenthood League. In discussing the standing issue raised in that case the Supreme Court did not distinguish the physician's status from that of the non-physician but stated that all of the appellants had:

> "standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston vs. Ullman*, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the

> standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime. * * * The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." 381 U.S. at 481.

The Court of Special Appeals opinion that the Appellants in this case do not "stand in such confidential and/or professional relationship to their 'clientele' as would invest them with standing under *Griswold* to assert the woman's right to abort a pending birth" is a broad assumption without any basis whatsoever in law or fact. The Court of Special Appeals' characterization of the relationship of the abortionist to his client as being one of "furtive and clandestine contract with the abortionist's interest in his client's welfare secondary to his own interest in avoiding detection" is also without basis, especially as applied to the Appellants.

Likewise, in the present case, if women do have a constitutional right to terminate a pregnancy at some point then the Appellants cannot be convicted under a statute which if applied would practically prohibit and unnecessarily restrict this protected right. Just as in *Karalexis,* the right of the individual is held to extend to those who make this right available. If the professional supplier of obscenity has standing to assert the constitutional rights of an individual to view such material, if the State has improperly restricted this right even an abortionist, has standing to assert the rights of pregnant women if the State

has not properly exercised its right to police and regulate abortions.

The contrary decision of the court below, if permitted to stand, would result in inconsistent treatment of the appellants in the State Courts of Maryland and the United States Courts. Certainly the area of standing in challenging the constitutionality of the 1st Amendment infringments is certainly broad enough to justify appellants' claim here. The statute in question is not dissimilar from the statute challenged in *Vuitch* or *Babbitz v. McCann,* October Term, 1970, No. 297.

2. *Article 27, Section 3, the statute in question is unconstitutional on its face and as applied to this case.*

It has long been the law that in order for a statute to pass constitutional muster it must possess:

> "The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S. Ct. 618, 81 L. Ed. 888; see also: *Connally v. General Const. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322;"

People v. Belous, supra.

The Maryland Statute, Article 27, Sec. 3, (1967 Supp.) prior to its repeal in 1968, provided that it was misdemeanor to:

> "knowingly use or cause to be used certain instruments, drugs, mixtures, prescriptions, medicines and

> other noxious things, . . . for purposes of causing miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy . . ."

The same statute provided the penalties as well as a vague exception for therapeutic abortions "by a regular practitioner of medicine," who "after consulting" with another doctor "shall be satisfied that . . . the fetus is dead or that no other method will secure the safety of the mother."

Similar statutes in California, Pennsylvania, Wisconsin, Texas and the District of Columbia recently have been found to be unconstitutional for the same faults upon which the challenge herein is made.

In *United States v. Vuitch, supra,* the Court ruled a similar statute to be unconstitutional on several grounds. First, that the language providing for the medical abortions exception is so imprecise, as to be void for vagueness.[2] Second, the statute improperly limits a physician in carrying out his professional responsibility. Thirdly, the statute interferes with a woman's right to avoid childbirth for any reason.[3] The standard in the District of Columbia Act was "as necessary for the" preservation of the mother's life or health.

The Court, in holding the statute unconstitutional, said, as to the vagueness of the medical exception:

> "The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and un-

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[2] The language of the Opinion dated November 18, 1969, is "as necessary for the preservation of the mother's life or health."

[3] As recent as Saturday, December 13, 1969, the Court of Appeals of New York has enjoined all prosecutions under their statute as a result of its questioned constitutionality for many of the same reasons argued here.

> certain work 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body or medical knowledge delineates what degree of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code."

As to the women's right to avoid childbirth:

> "There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a women's liberty and right of privacy extends to family, marriage, and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy".

Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" are discussed and are well documented in *People v. Belous, supra.* In that case, a conspiracy prosecution of a doctor who advised a patient to seek the services of a non-doctor to perform an abortion, the Court found the statute unconstitutional on numerous grounds. First, that the standard provided in the exemption for legitimate medical abortions was void for vagueness.[4]

The Court said:

> "Various possible meanings if necessary to preserve * * * 'life' have been suggested. However, none of the proposed definitions will sustain the statute.
>
> "Respondent (the State) asserts: 'If medical science feels the abortion should be performed as it is neces-

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[4] The Therapeutic Abortion Act (Health & Saf. Code, §§25950-25954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§25951, subd. (a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§25951, subd. (b)); *and there is "substantial*

> sary to preserve her life, then it may be performed; that is, unless it is performed the patient will die.'
>
> "Our courts, however, have rejected an interpretation of 'necessary to preserve' which requires certainty or immediacy of death."

We urge upon this Court that the Maryland standard applied in determining the propriety of a medical abortion is no more discernible.[5]

Furthermore, the California Court rejected as an unconstitutional limitation on a woman's right to terminate a pregnancy any standard or interpretation which requires "certainty or immediacy of death," to justify a therapeutic abortion.

> "Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children."[6]

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risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§25951, subd. (c)(1)); the pregnancy resulted from rape or incest (§25951, subd. (c)(2)); or the woman is under 15 years of age (§25952, subd. (c)). (Emphasis provided.)

[5] "shall be satisfied . . . that no other method will secure the safety of the mother." Article 27, §3, Annotated Code of Maryland (1967 Supp.).

[6] The Court went on and elaborated the extent of this right and its origin:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. (See, e. g., Griswold v. Connecticut, supra, 381 U.S. 479, 485, 486, 500, 85 S. Ct. 1678, 14 L. Ed. 2d 510; Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma ex rel. Williamson (1942), 316 U.S. 535, 536, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 [sterilization laws; marriage and

The most direct and recent pronouncement by the United States Supreme Court regarding the existence of this "right of the woman" is in *Griswold v. Connecticut, supra.* In that case, the Court went to great lengths to emphasize and promote the existence of this right.

> "In a long series of cases, this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. City of Little Rock, 361 U.S. 516, 524 . . . The law must be shown 'necessary and not merely rationally related to, the accomplishment of a permissible state policy' McLaughlin v. State of Florida, 379 U.S. 184, 196, . . ."
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> * * * * * *

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procreation involve a 'basic liberty']; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399-400, 43 S. Ct. 625, 67 L. Ed. 1042 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal. 2d 711, 715, 198 P. 2d 17; see also Custodio v. Bauer, 251 Cal. App. 2d 303, 317-318, 59 Cal. Rptr. 463). That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See e.g., Carrington v. Rash (1965) 380 U.S. 89, 96, 85 S. Ct. 775, 13 L. Ed. 2d 675 [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505-506, 84 S. Ct. 1659, 12 L. Ed. 2d 992 and Kent v. Dulles (1958) 357 U.S. 116, 125, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500, 74 S. Ct. 693, 98 L. Ed. 884 [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal. 2d 596, 602, 51 Cal. Rptr. 284, 414 P. 2d 412, [right to vote]; cf. Finot v. Pasadena City Bd. of Education, 250 Cal. App. 2d 189, 199, 58 Cal. Rptr. 520.) It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right." at 357.

> "it is clear that the State interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly . . ."

So too, in *Belous*, the California Court found that the law improperly restricted women in areas where the State has no right to govern. Needless to say, the Maryland statute, prior to its repeal, suffered from similar maladies — a brief reading of the new law indicates, that the General Assembly felt that the statute under which the prosecutions here were brought was oppressive, arbitrary and not in perspective with the needs of a modern society.[7]

The *Vuitch* court found further fault with the District of Columbia statute in the way in which it was applied.

> "The Court of Appeals established by such early cases as *Peckham v. United States*, 96 U.S. App. D.C. 312 (1955), cert. denied, 350 U.S. 912 and *Williams v. United States*, 78 U.S. App. D.C. 147 (1943), that upon the Government establishing that a physician committed an abortion the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as Leary, 395 U.S. 6 (1969), and Gainey, 380 U.S. 63 (1965), also emphasize the lack of necessary precision in this criminal statute."

The Maryland statute too, contains the identical constitutional defects as did the statutes of California, Pennsylvania, Wisconsin, Texas and the District of Columbia, as construed, and applied. In the first instance, the Mary-

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[7] Acts of Maryland 1968 — Chapter 470, Section 1 effective 7/1/68.

land statute attempts, within one paragraph to provide a prohibition, its penalty and a rather vague exception, covering an extremely broad area. In this regard, the statute overlooks entirely, the existence of the woman's right to terminate a pregnancy at some point, as well as providing a reasonable and legitimate standard by which therapeutic abortions are allowed.

The fact that the statutory crime of abortion has been expanded over its comman law ancestor is indeed worthy of note. Abortion did not become a statutory crime in the United States until about 1830. In Maryland, the first abortion statute was enacted in 1868, and for 100 years the subject has received little attention. In enlarging upon the common law[8] the Maryland Statute, if literally construed would prohibit the use of certain contraceptive devices which are clearly protected under *Griswold v. Connecticut, supra,* i.e. the morning after pill. The controversy surrounding abortions covers a wide spectrum of points: moral, ethical, social, economic, legal, political, and humanitarian, as well as medical. Any statute which attempts to treat this all important and extensive subject in a mere paragraph combining prohibition, penalty and exception can certainly not meet the tests imposed upon the State in regulating "in the realm of family life . . . without substantial justification." *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166.

Much has been said and much has been written regarding the need for abortion reform.[9] That the right of a

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[8] "any woman pregnant with child, at any period of her pregnancy" Article 27, Section 3, Maryland Annotated Code, 1967 Supplement.

[9] Lader, *Abortion,* Beacon Press, 1966; Rosen, *Abortion in America,* Beacon Press, 1967; Smith, *Abortion and the Law.* The Press of Western Reserve University, 1967; Lucas, *Federal Constitutional*

woman to terminate a pregnancy at some point is now well recognized. The Courts in *Vuitch* and *Belous* have extended the *Griswold* doctrine to situations similar to ours. The Maryland statute which Appellants here challenge, is no different. It was written over 100 years ago when little on the subject was known and less understood. As the Court said in *Griswold*:

> "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities, constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom. NAACP v. Alabama, 377 U.S. 288, 307".

The Appellants recognize that in many of the cases relating to the constitutional adequacy of a given statute that he who raises the issue must have standing. Normally, standing is defined as one who would directly be affected if the statute were construed otherwise. Arguably, the fact that the Appellants here are not practitioners of medicine may deny them this standing. However, in recent cases in the Federal Courts, the issue of determining standing has been somewhat modified. This is especially so in cases involving constitutionally protected rights and freedoms. In the case of *Karalexis et al. v. Byrne, supra*, where a three Judge District Court heard a frontal attack upon the Massachusetts obscenity statute. That case involved the movie, "I Am Curious-Yellow". The basis of the challenge there was that in the Supreme Court's recent decision of *Stanley v. Georgia*, 394 U.S. 557, where the Supreme Court

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Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L. Rev. 730 (1968); Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 Western Res. L.R. 435 (1965); Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L.R. 1 (1969).

reversed a conviction based on the possession of an obscene movie found in the home of the Defendant, on the grounds that possession of obscene material may be offensive but is not per se harmful and, therefore, Stanley's right to possess it was constitutionally protected.

The Massachusetts District Court expanded the *Stanley* theory (the individual's right to possess obscene material) to include the obverse, the permitting another to provide this right. The Court said:

> "It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would expect its execution to be only at the expense of a criminal act at the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it."

The *Karalexis* formulation is extremely relevant to our situation. While it is beyond doubt that there exists a right of a woman to terminate a pregnancy at some point, (according to some, prior to quickening, while others would extend this right up and until childbirth). The Maryland statute as construed and applied certainly proves inadequate to insulate this right and would if applied, completely destroy it.

In this regard, the Appellant cannot be convicted under a statute which if applied would practically prohibit and unnecessarily restrict this constitutionally protected right. Just as in *Karalexis* the right of the individual is held to extend to he who makes this right available.

While it is clear that the State would have a right to regulate and restrict those who may perform abortions, it may do so only so long as it does not inhibit, deprive, or

improperly restrict those entitled to exercise and utilize this right to its fullest.

There are presently pending before this Court several cases involving similar statutes of other jurisdictions not dissimilar from that of Maryland. The arguments contained in the Motion to Affirm in *United States v. Vuitch*, No. 1155, October Term, of 1969, and in *Babbitz v. McCann*, No. 297, October Term, 1970, are relevant and applicable to the within case. We urge this Court to consider the Appellants' position in light of the very serious and important issues which the Court is now considering relating to the right to an abortion and to terminate pregnancy. We feel that the issues presented are identical and that the regulation to be imposed should be uniform.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

JOSEPH S. KAUFMAN,
ISAAC M. NEUBERGER,
Attorneys for Appellants.

APPENDIX A

In The
Court of Special Appeals of Maryland

No. 336

September Term, 1969

Woodrow Wilson Lashley, Sr.
and
Claire Anita Ryza,
v.
State of Maryland.

Before: Murphy, C. J., Anderson, Morton, Orth and Thompson, JJ.

Opinion by Murphy, C.J.

Filed: August 11, 1970

Appellants Lashley and Ryza were convicted at a court trial under criminal informations charging that on November 17, 1967 they committed two illegal abortions, engaged in the commission of three conspiracies to commit abortion and practiced medicine without a license. On appeal it is contended (a) that the search warrant under which incriminating evidence was seized from the appellants was issued without probable cause, and (b) that the statute under which the substantive counts of abortion were

brought — Maryland Code, Article 27, Section 3 (now repealed) — was unconstitutional.[1]

At the trial evidence was adduced showing that on November 17, 1967 the police, armed with a search warrant, entered the premises at 6114 Lawyers Hill Road in Howard County and arrested the appellants, both of whom were occupying the premises under false names; that tangible evidence was there seized showing that abortions were being performed on the premises; that there was evidence showing that two abortions had been performed that day by the appellants; and that three other pregnant girls had been brought to the premises to have abortions performed by appellants. The evidence showed that neither appellant had a license to practice medicine.

I.

It is the firmly established law of Maryland that the presence or absence of probable cause to support a search warrant must be determined solely from the sworn allegations of the application for the warrant. *Tucker v. State*, 244 Md. 488; *Scarborough v. State*, 3 Md. App. 208. The application for the search warrant in the present case — some fifteen typewritten pages in length — was signed and sworn to by three officers of the Maryland State Police. It recited their belief that the laws relating to the commission of illegal abortions were being violated upon the premises at 6114 Lawyers Hill Road. It was stated in the affidavit that information had been received by one of the affiants in October of 1967 "from a confidential source, who has supplied him with reliable information in the past," that appellants were performing illegal abortions on Lawyers Hill Road. As a result of this information, the affiants stated that a police investigation was conducted which showed that Lashley had been convicted of com-

[1] Section 3 was repealed by Chapter 470 of the Acts of 1968. The repealing Act, now codified as Sections 149E-149G, inclusive, of Article 43, enacted a new abortion statute, it being expressly provided that nothing in the new Act "applies to or affects the prosecution or penalty for, any event or occurrence prior to the effective date of this Act."

mitting an illegal abortion in 1958 in Virginia; that both Lashley and Ryza had been arrested in 1962 for violating the abortion laws in the District of Columbia and, while neither was convicted, police records in that jurisdiction indicated that Lashley's fingerprints had been found on the equipment used to conduct the illegal abortions; that further investigation revealed that the telephone listed for 6114 Lawyers Hill Road was in the name of Robert Wright; that the owner of 6114 advised the affiants that he had leased the premises to Wright and his wife in November of 1966; that the owner identified a photograph of Ryza as Mrs. Wright; that the owner was shown a photograph which police had obtained of Robert Wright and he stated that Wright was not the man who rented the premises from him; that investigation revealed that Lashley and Ryza resided in Charles County, Maryland; and that the neighbor next to 6114 stated that he saw no indication that 6114 was being used as a dwelling. The affidavit then recited the results of a police surveillance of 6114 conducted from November 2, 1967 through November 12. In general, the recitations in the affidavit showed that Lashley and Ryza were observed on the premises; that on November 3, 7, and 10, a total of sixteen females arrived in various motor vehicles, all of which, in one way or another, were connected with Lashley and/or Ryza; that the girls were accompanied to the door of 6114 by their driver, after which the driver departed and the girls entered the premises; that the girls left the premises the same day by the same vehicle that brought them; that on the days when no girls were observed entering 6114, there was no activity on the premises, although lights were observed within the house. The affidavit concluded by alleging that the affiants had a total of twenty-two years police experience and that based on this experience, they believed the actions which they observed were not consistent with the maintenance of a dwelling house but were consistent with the use of the premises to conduct illegal abortions.

Only the probability and not a *prima facie* showing of criminal activity is the standard of probable cause. *Beck v. Ohio,* 379 U.S. 89; *Cornish v. State,* 6 Md. App. 167.

Evidence sufficient for conviction is thus not required. *Grimm v. State,* 6 Md. App. 321. The legal principles determinative of the question whether probable cause is shown by the application for a search warrant are so well settled as to require no elaboration of their import. *See Spinelli v. United States,* 391 U.S. 933; *Henderson v. State,* 243 Md. 342; *Henson v. State,* 236 Md. 518; *Silbert v. State,* ..... Md. App. ....., No. 507, September Term, 1969 (filed July 21, 1970); *Price v. State,* 7 Md. App. 131; *Hall v. State,* 5 Md. App. 394; *Frey v. State,* 3 Md. App. 38. While an undisclosed informer's reliability is obviously not established by the affiants' mere unsupported and unparticularized conclusory assertion that the informer has supplied reliable information in the past, *Iannone v. State,* 10 Md. App. 81, No. 564, September Term, 1969 (filed July 24, 1970), where, as here, the information provided by the informer's tip is substantially corroborated by independent police work undertaken by the affiants, we think the informer's tip, together with the other allegations in the warrant, may be collectively considered in determining whether probable cause exists for the issuance of the warrant. *See Spinelli v. United States, supra; Iannone v. State, supra; Price v. State, supra.* Of course, when a search is based upon a magistrate's, rather than a police officer's prior determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant. *Aguilar v. Texas,* 378 U.S. 108; *Jones v. United States,* 362 U.S. 257. Equally well settled is the principle that the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants. *United States v. Ventresca,* 380 U.S. 102; *Tucker v. State, supra.* Within this constitutional framework, we conclude that the search warrant was validly obtained and that the evidence thereunder seized was properly admitted at the trial.

II.

Appellants contend that Article 27, Section 3 is unconstitutional because vague and uncertain in its application.

Prior to its repeal in 1968, Section 3 provided that it was a misdemeanor for any person, *inter alia,*

> "* * * knowingly [to] sell, or cause to be sold any * * * poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever [for the purpose of producing abortion]; or from whom any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished * * *; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."

The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed of what State law commands or forbids; consequently, a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Lanzetta v. New Jersey,* 306 U.S. 451; *Connally v. General Construction Co.,* 269 U.S. 385.

In *Roeder v. State,* 4 Md. App. 705, 709, we held that the nature of the activity proscribed by Section 3 "is clearly

any specified effort knowingly directed at the causation or procurement of a miscarriage or abortion of any woman, pregnant with child, at any period of her pregnancy, excluding that legally condoned exercise by a medical practitioner." To like effect, *see Hays v. State*, 40 Md. 633. We think it altogether clear from the express terms of Section 3, as well as from the cases, that the production of abortion under the statute is plainly retricted to practitioners of medicine when, after consulting at least one other physician, the physician is satisfied that the fetus is dead, or, if alive, "that no other method will secure the safety of the mother." We thus find no merit in appellants' contention that the statute failed to give them fair notice that, as non-physicians, they were prohibited from performing abortions under any circumstances. That it is within the police power of the State to outlaw the commission of abortions that are not performed by qualified physicians is, we think, beyond question. *See Babbitz v. McCann*, 310 F. Supp. 293 (D.C. E.D.); *United States v. Vuitch*, 305 F. Supp. 1032 (D.C. D.C.).[2]

Appellants particularly urge that the proviso in Section 3, permitting therapeutic abortions by medical doctors is so vague and indefinite as to violate due process in that it does not give fair notice of what acts will be punished. For this pr osition appellants rely primarily on *Roe v. Wade*, ... F Supp. ..... (D.C. N.D. Tex.); *People v. Belous*, 458 P. 2d 194 (S. Ct. Cal.); *Babbitz v. McCann, supra*, and *United States v. Vuitch, supra*. On the authority of the same cases and on *Griswold v. Connecticut*, 381 U.S. 479, appellants also claim that Section 3 is unconstitutional because it interferes with the woman's right to avoid child-

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[2] In *Vuitch*, the Court said (p. 1034):

"* * * While there have been many advances in medical knowledge and techniques since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction. Indeed there is ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians."

birth for any reason she may choose.[3] We do not reach the merits of either contention. Ordinarily, a person has no standing in court to vindicate the constitutional rights of others. *Griswold v. Connecticut, supra; Barrows v. Jackson,* 346 U.S. 249. In *State v. Cherry,* 224 Md. 144, 155, the Court of Appeals noted that while, as a general rule in criminal prosecutions, the accused has the right to assert the invalidity of the law under which he is being prosecuted, he must show that his rights are adversely affected by the statute and more particularly that his rights are thus affected by the particular feature of the statute alleged to be in conflict with the constitution, it not being sufficient that the statute may impair the rights of others. To like effect, *see Brown v. State,* 177 Md. 321; *Crouse v. State,* 130 Md. 364; *Parker v. State,* 99 Md. 189. Appellants are neither physicians nor women seeking to assert an allegedly endangered constitutional right to avoid childbirth. Appellants do not assert how, as non-physicians, the statute inflicts an unconstitutional injury upon any particular constitutionally protected interest of theirs, it not being alleged that limiting the production of abortions to medical doctors is a violation of their constitutional rights. Indeed, the abortionist would seem to be the least likely advocate of a claim to move liberally for licensed practitioners of medicine to produce abortions. We hold that appellants lack standing to attack as unconstitutional on due process grounds the proviso in Section 3 governing

[3] In *Roe,* a three-judge court declared restrictions limiting medical abortions to "saving the life of the mother" to be vague, overbroad, and unnecessary State restrictions on the Ninth Amendment right of women to choose whether to have children. In *Belous,* the court found that a similar restriction placed upon medical judgment was too uncertain to satisfy due process requirements and at the same time protect the fundamental constitutional rights of the mother. In *Babbitz,* a similar restriction was deemed an unconstitutional infringement upon a woman's constitutional rights under the Ninth Amendment. In *Vuitch,* the court held that a restriction limiting medical abortions to those necessary "for the preservation of the mother's life and health" was unconstitutionally vague. In *Griswold,* the Supreme Court held that there were fundamental constitutional rights arising out of the family and home situation, involving marriage and sex, which could not be arbitrarily restricted by State action.

abortions by licensed physicians. Nor do we think the appellants stand in such a confidential and/or professional relationship to their "clientele" as would invest them with standing under *Griswold* to assert the woman's right to abort a pending birth. The relationship of the abortionist to his "client" is hardly a professional one entailing continued confidence and consultation; rather, it is one of furtive and clandestine contact with the abortionist's interest in his client's welfare secondary to his own interest in avoiding detection.[4]

JUDGMENT AFFIRMED;
APPELLANTS TO PAY COSTS.

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[4] Even if appellants had standing to attack the medical proviso in Section 3, and it was held vague and indefinite, or they had standing to assert the woman's right to privacy, and it was held that the statute was overbroad in restricting such right, we think the provisions of the statute would nevertheless be considered severable, *viz.*, that it would properly bear interpretation as still outlawing abortions except when performed under the direction of competent physicians. See *United States v. Vuitch, supra.*

APPENDIX B

In The
Court of Appeals of Maryland

Miscellaneous Docket No. 215

September Term, 1970

(No. 336, September Term, 1969
Court of Special Appeals)

Woodrow Wilson Lashley, Sr. and Claire Anita Ryza

v.

State of Maryland

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

HALL HAMMOND,
Chief Judge.

(Seal)

Date: November 10, 1970.

FILED
MAY 3 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1328 ~~Misc.~~

WOODROW WILSON LASHLEY, SR.
AND
CLAIRE ANITA RYZA,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1328 MISC.

WOODROW WILSON LASHLEY, SR.
AND
CLAIRE ANITA RYZA,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEALS OF MARYLAND

Appellee moves to dismiss the appeal from the Order of the Court of Appeals of Maryland dated November 10, 1970 (App. B. to Appellants' Jurisdictional Statement), which Order denied Appellants' Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland. The grounds for the Motion are: (1) that the decision appealed from was not in favor of the validity of a State statute questioned as being repugnant to the Constitution of the United States, and (2) Appellants have no standing

in this Court to assert that the State statute is unconstitutional. In addition, if this Honorable Court determines that Appellants have standing to prosecute this appeal, the statute in question is not unconstitutional.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 136, 268 A. 2d 502 (1970). It is also reprinted in the Appendix to Appellants' Jurisdictional Statement, App. A., p. 1a. The Order of the Court of Appeals of Maryland denying Appellants' Petition for Writ of Certiorari was entered without Opinion and is reprinted in the Appendix to Appellants' Jurisdictional Statement as App. B., p. 9a.

JURISDICTION

Appellee submits that this Honorable Court does not have jurisdiction over this case under 28 U.S.C.A., Section 1257(2) as asserted by Appellants.

STATUTORY PROVISIONS INVOLVED

Appellants assert that Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) is involved. The statute is reprinted in its entirety at pages 2-3 of Appellants' Jurisdictional Statement. This statute was repealed by Chapter 470, Section 1 of the Laws of Maryland, 1968 and replaced by the Therapeutic Abortion law, presently contained in Article 43, Sections 137-139, Maryland Code Annotated (1971 Repl. Vol.).

QUESTIONS PRESENTED

1. Whether or not Appellants may invoke the provisions of 28 U.S.C.A., Section 1257(2) to appeal directly to this Honorable Court.

2. Whether or not Appellants have standing to assert the unconstitutionality of Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.).

3. If questions 1 and 2 are answered in the affirmative, was Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) unconstitutional (prior to its repeal) as a violation of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Appellants were convicted in the Circuit Court for Wicomico County, Maryland, by the trial court sitting without a jury, on two counts charging the commission of two abortions, three counts charging conspiracy to commit abortion and practicing medicine without a license. Appellants were sentenced to concurrent terms of two years imprisonment on each of the counts charging abortion and conspiracy to commit abortion and each was fined $50.00 on the conviction for practicing medicine without a license.

At a preliminary hearing, the trial court heard considerable evidence concerning the facts contained in the affidavits of three members of the Maryland State Police who obtained a search and seizure warrant for the premises known as 6114 Lawyers Hill Road in Elkridge, Howard County, Maryland, which led the affiants to conclude that the abortion laws were being violated on those premises. After finding that the search warrant had been validly issued and the evidence obtained in execution thereof was admissible, the trial proceeded on an Agreed Statement of Facts. These facts were briefly, that on November 17, 1967, the police, armed with the warrant, entered the premises at 6114 Lawyers Hill Road arresting the Appellants who were occupying the premises under false names.

The police seized tangible evidence showing that abortions were being performed on the premises, which evidence further indicated that Appellants had performed two abortions that day. Three pregnant girls were present on the premises and admitted that they were there to have abortions performed upon them by the Appellants. The two girls who had abortions performed on them admitted that the Appellants had performed the abortions, were taken to the hospital and examined. After the examining physicians found them to have had recent abortions, the girls remained for treatment. It was admitted under this Agreed Statement of Facts that neither Appellant was licensed to practice medicine.

In their appeal to the Court of Special Appeals of Maryland, Appellants raised two issues: (a) That the search warrant, under which the incriminating evidence was seized, had been issued without probable cause, and (b) that the statute under which the counts charging abortion and conspiracy to commit abortion had been brought was unconstitutional. After thoroughly reviewing the facts contained in the affidavits leading to the issuance of the search warrants, the Court of Special Appeals of Maryland concluded that the warrant had been validly obtained and the evidence seized thereunder properly admitted at the trial. In contending that the applicable statute, Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) was unconstitutional, Appellants contended in the Court of Special Appeals of Maryland that (1) the statute was vague and uncertain in its application to them as non-physicians, (2) that the statutory provisions permitting therapeutic abortions by licensed physicians similarly was unconstitutional because it failed to give fair and definite notice of the prohibited acts, and (3) that the statute was unconstitutional as an interference with the right of a

woman to avoid childbirth for any reason she might desire. In its opinion the Court of Special Appeals of Maryland disposed of the first contention finding that the statute gave Appellants fair notice that they were prohibited from performing abortions under any circumstances as non-physicians and that such a criminal statute was within the constitutional police power of the State. On the second contentions in which Appellants asserted the unconstitutionality of the statute as it affected licensed physicians and as it affected the woman's right to avoid childbirth, the Court held that Appellants had no standing to assert the constitutional rights possessed by others, and therefore, did not reach the constitutional questions presented in this appeal by the Appellants.

ARGUMENT

I.

APPELLANTS MAY NOT INVOKE THE PROVISIONS OF 28 U.S.C.A., SECTION 1257 (2) TO APPEAL DIRECTLY TO THIS HONORABLE COURT.

The Supreme Court of the United States has jurisdiction to review final judgments or decrees rendered by the highest court of a state on direct appeal, "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C.A., Section 1257 (2). It is the position of the Appellee herein that Appellants did not possess standing, either in the court below or in this Honorable Court, to question the validity of a state statute on the grounds assigned and that therefore, the highest court of the State of Maryland did not have occasion to decide the question of the constitutionality of a statute of the State of Maryland.

While the opinion of the Court of Special Appeals of Maryland indicates that the Appellants raised the contention there that Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) was unconstitutional because it was vague and uncertain in its application, it is submitted that the issue of unconstitutionality was raised only in connection with Appellant's contention that the statute was unconstitutional as applied to medical doctors and as it affected the pregnant woman's right to avoid childbirth. The question of application of the statute to Appellants themselves, who were not qualified physicians, was raised as a question of the sufficiency of the indictment to charge an offense. On this question the Court of Special Appeals found that the indictment under which Appellants were convicted had provided fair notice to them, as non-physicians, of the prohibition against non-physicians performing abortions under any circumstances.

The Court of Special Appeals of Maryland held that Appellants had no standing to raise or attempt to vindicate the constitutional rights of others (in this case, medical doctors and pregnant women) as they were affected by the provisions of the then Maryland Abortion law. Appellants' Jurisdictional Statement in this Honorable Court raises only the question of Appellants' right or standing to attack the constitutionality of the then Maryland Abortion statute as vague and indefinite as applied to license medical practitioners and as an infringement upon the right of a pregnant woman to choose whether she will bear a child or have an abortion. The substantive question of standing will be discussed in the succeeding argument; but as it affects the question of jurisdiction to consider the issue on direct appeal, it is respectfully submitted that the highest court of the State of Maryland did not have the opportunity to determine the validity of the State

statute on constitutional grounds, finding that the Appellants had no standing to raise this issue, and that therefore this question may not be presented to this Honorable Court on direct appeal.

II.

APPELLANTS HAVE NO STANDING TO ASSERT THE UNCONSTITUTIONALITY OF ARTICLE 27, SECTION 3 MARYLAND CODE ANNOTATED (1967 REPL. VOL.).

Appellee submits that the Court of Special Appeals of Maryland properly concluded that Appellants, neither of whom are either physicians or women seeking to assert their right to an abortion, had no standing to assert that the statute had adversely affected their constitutional rights. Having admitted that the State may, under its police power, outlaw the commission of abortions by those who are not qualified physicians, the lower court properly concluded that Appellants had not shown any way in which the State's statute had inflicted an unconstitutional injury upon any lawfully protected interest they possessed, *i.e.*, they possessed neither the right of a medical doctor to perform a therapeutic abortion nor the right of a pregnant woman to obtain an abortion.

As pointed out in *Flast v. Cohen*, 392 U.S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968) "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." And in *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969), it was stated:

> "The concept of standing to sue, as we noted in *Flast v. Cohen, supra*, 'is surrounded by the same complexities and vagaries that inhere in [the concept of] justiciability' in general. 392 U.S. at 98, 20 L. Ed. 2d at 960. Nevertheless, the outlines of the concept can be

> stated with some certainty. The indispensable requirement is, of course, that the party seeking relief allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . .' *Baker v. Carr,* 369 U.S. 186, 204, 7 L. Ed. 2d 663, 677, 82 S. Ct. 691 (1962); see *Flast v. Cohen, supra; Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 151, 95 L. Ed. 817, 842, 71 S. Ct. 624 (1951) (concurring opinion). In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen, supra,* at 99-100, 20 L. Ed. 2d at 961. The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen, supra,* at 101-106, 20 L. Ed. 2d at 962-965."

It may thus be observed that the important element in this question of standing is that the party challenging the State statute possesses some "legally protected interest" which he contends has been unconstitutionally denied him.

The case of *Griswold v. Connecticut,* 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) may be readily distinguished in that appellants in that case were charged and convicted with aiding and abetting married persons with whom they had a professional relationship in the use of a drug, medicinal article or instrument for the purpose of preventing conception. Appellants in *Griswold* were an officer of the Planned Parenthood League of Connecticut and a licensed physician employed by the League to give information, instruction and medical advice to married persons as to means of preventing conception. There, this Court

clearly held that the appellants, operating within a professional and confidential relationship with their patients possessed a legally protected interest affected by the sweep of the state's statute.

Appellants herein, as pointed out by the Court of Special Appeals of Maryland, have no such legally or constitutionally protected interests and do not stand in any such confidential or professional relationship to their "patient", sufficient to invest them with standing to assert either the licensed physician's right to perform a therapeutic abortion or the pregnant woman's right to terminate her pregnancy. In addition, it is clear that Appellants here cannot assert that their rights in any way have come within the penumbra of those basic and fundamental rights guaranteed in the Bill of Rights to the Constitution of the United States, which was so forcefully enunciated in *Griswold v. Connecticut, supra.*

III.

ARTICLE 27, SECTION 3, MARYLAND CODE ANNOTATED (1967 REPL. VOL.) WAS NOT UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST, FOURTH, NINTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES (AS APPLIED PRIOR TO REPEAL).

Assuming, *arguendo,* that Appellants possess the standing to attack the constitutionality of the State statute and that such action may be taken on direct appeal to this Honorable Court, the substantive issue presented has been fully answered by the recent action of this Court in upholding the constitutionality of the District of Columbia Abortion law in *United States v. Vuitch,* No. 84, October Term, 1970 (opinion delivered April 21, 1971), (reversing *United States v. Vuitch,* 305 F. Supp. 1032 (D.C. D.C. 1969)).

Appellants contended in their Jurisdictional Statement that the issues presented in *United States v. Vuitch, supra,*

and in *Babbitz v. McCann,* No. 297, October Term, 1970 are identical with the issues on the merits presented in the instant case (Jurisdictional Statement, p. 19). This Honorable Court vacated and remanded *Babbitz v. McCann, supra,* on April 19, 1971, in light of *Younger v. Harris,* 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. ..... (1971) and *Samuels and Fernandes v. Mackell,* 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. ..... (1971). 39 L.W. 3455.

Appellee joins Appellants in asserting that the holding in *United States v. Vuitch, supra,* is directly applicable to dispose of the issues presented in this case. The District of Columbia Abortion law made it a felony for anyone other than a competent licensed practitioner of medicine to perform an abortion and provided that such a licensed physician could perform an abortion only if the same was done "as necessary for the preservation of the mother's life or health". 22 D.C. Code 201. The Maryland statute in question here, similarly made it a felony for anyone other than a regular practitioner of medicine to perform or cause an abortion to be performed and permitted a regular practitioner of medicine to supervise a natural or spontaneous abortion or to perform an abortion only after consultation with one or more other physicians to satisfy himself that the foetus is dead or "that no other method will secure the safety of the mother". Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.). The statutes are substantially similar enough to be considered together.

This Honorable Court in *United States v. Vuitch, supra,* concluded that the District of Columbia Abortion law did not place upon the physician the burden to prove his innocence but rather placed upon the prosecution the burden to plead and prove that the abortion was not necessary for the preservation of the mother's life or health and further

found that the use of the term "health" was not constitutionally offensive under the Due Process clause as a vague or indefinite definition. A similar result must follow in this case if this Honorable Court considers the constitutional merits of the former Maryland Abortion law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellants' appeal from the Court of Appeals of Maryland should be dismissed.

Respectfully submitted,

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